

Louisiana Law Review

Volume 49 | Number 3

January 1989

The Louisiana Code of Evidence - A Retrospective and Prospective View

George W. Pugh

Robert Force

Gerard A. Rault Jr.

Kerry J. Triche

Repository Citation

George W. Pugh, Robert Force, Gerard A. Rault Jr., and Kerry J. Triche, *The Louisiana Code of Evidence - A Retrospective and Prospective View*, 49 La. L. Rev. (1989)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol49/iss3/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

THE LOUISIANA CODE OF EVIDENCE—A RETROSPECTIVE AND PROSPECTIVE VIEW*

*George W. Pugh***

*Robert Force****

*Gerard A. Rault, Jr.*****

*Kerry J. Triche******

For evidentiary rules to serve their high purpose, they should be fair, practical and very accessible. With the adoption of the Louisiana Code of Evidence these goals are much nearer fruition. To achieve an in-depth understanding of the Code and appreciate the nuances of many of its individual provisions, it is helpful to have a knowledge of the legislative history of the Code and to compare the final product with the provisions of the Code as originally proposed. Further, since many of the provisions of the Louisiana Code of Evidence are grounded in the Federal Rules of Evidence, it is similarly helpful to have an appreciation of its formulation, first by the Supreme Court and later by the Congress.¹

The Louisiana Code of Evidence is the end product of a very long historical development, both in this state and elsewhere. The acknowledged master in the movement for evidentiary reform in Britain in the early nineteenth century was Jeremy Bentham. Within a short time of the publication of Bentham's "Theory of Judicial Evidence"² in 1818, Louisiana's great Edward Livingston (America's Bentham, as he was characterized by Wigmore)³ prepared and proposed to the Louisiana Legislature a Code of Evidence for this state, designed to govern pro-

* Reprinted from G. Pugh, R. Force, G. Rault, K. Triche, Handbook on Louisiana Evidence Law (West 1989) with the generous permission of the copyright holder, West Publishing Company.

** Julius B. Nachman Professor of Law, Louisiana State University; Coordinator and Co-Reporter, Code of Evidence Project, Louisiana State Law Institute.

*** Thomas Pickles Professor of Law, Tulane University; Director, Tulane Maritime Law Center; Co-Reporter, Code of Evidence Project, Louisiana State Law Institute.

**** Professor of Law, Loyola University; Director, Loyola Death Penalty Clinic; Co-Reporter, Code of Evidence Project, Louisiana State Law Institute.

***** Staff Attorney, Code of Evidence Project, Louisiana State Law Institute.

1. See Pugh, Federal Rules of Evidence: Foreword, 36 La. L. Rev. 59 (1975).

2. The first publication of Bentham's "Theory of Judicial Evidence" was in French. See 1 Wigmore, A Treatise on the Anglo American System of Evidence in Trials at Common Law 239 (3d ed. 1940).

3. Id. at 240.

ceedings in both civil and criminal cases. Had it been adopted, the development of evidence law in the United States might well have been very different. However, for reasons that are now obscure, the Livingston Evidence Code was not adopted by the Louisiana Legislature, and more than a century and a half was to elapse before an evidence code for Louisiana would finally be adopted.⁴

In 1956 the Louisiana State Law Institute was directed by the Louisiana Legislature to prepare a Code of Evidence applicable to both civil and criminal cases.⁵ Although the task was duly undertaken by the Institute, the project was set aside in 1966 because of a number of factors, including the circumstances that in 1965 Chief Justice Earl Warren had appointed an Advisory Committee composed of some of the nation's outstanding jurists, practitioners and scholars to formulate rules of evidence for federal district courts throughout the country, and promising efforts had resulted from that endeavor.⁶

The Advisory Committee on the Federal Rules of Evidence drew upon the splendid codification proposals earlier made by the American Law Institute in its Model Code of Evidence (1942) and by the National Conference of Commissioners on Uniform Laws in its Uniform Rules of Evidence (1953). An amended final draft proposed by the Advisory Committee was promulgated by the Supreme Court on November 20, 1972 and transmitted to Congress. Because of the opposition that developed, Congress undertook to reconsider the Rules in detail. After many amendments, the Federal Rules of Evidence were finally enacted by Congress and went into effect July 1, 1975.

By delaying its own codification project, Louisiana was able to take advantage of this national effort to simplify and modernize the law of evidence. In 1979, the Louisiana Legislature, via House Concurrent Resolution number 250, indicated legislative interest in a Code of Evidence for civil and criminal cases based on the Federal Rules of Evidence, and requested that the Judicial College prepare a draft of such a code expeditiously and submit it to the Louisiana State law Institute for its recommendations and comments. Although this effort towards codification did not achieve fruition, in light of the interest expressed by the legislature and by members of the legal profession in a Code of Evidence, the Law Institute in 1981 decided once again to undertake the preparation of a Code of Evidence. Three Louisiana law professors

4. For a brief discussion of the Edward Livingston code and a citation of authorities see Pugh, *supra* note 1, at 60. For a discussion of the impact of Edward Livingston's legal writings outside of Louisiana, see Lyons, *The European Response to Edward Livingston's System of Criminal Law*, 24 Loy. L. Rev. 621 (1978).

5. 1956 La. Acts No. 87.

6. For a brief history of the Federal Rules of Evidence, see Van Pelt, *Federal Rules of Evidence: Introduction*, 36 La. L. Rev. 66 (1975).

were named to serve as Co-Reporters on the project, one of whom was also designated Coordinator. An Advisory Committee of very distinguished professionals reflecting the various points of view involved was also established.⁷

The first matters to be resolved by the Law Institute were basic policy issues concerning the nature of the product sought to be achieved. Upon recommendation of the Reporters, both the Advisory Committee and the Council of the Law Institute agreed, *inter alia*: (1) that a unitary Code should be prepared, i.e., a Code embracing both civil and criminal, jury and nonjury cases, specifying where appropriate whatever divergent rules should be established; (2) that no attempt should be made comprehensively to codify constitutional evidentiary rules; and (3) that policy considerations should generally take precedence over uniformity with the Federal Rules of Evidence, but that where there is no substantial difference between Louisiana and federal policy decisions as to a particular rule of evidence, to avoid picky, meaningless distinctions that might thereafter be inferred, the Louisiana rule generally should be stated in the same word formula used in the Federal Rules of Evidence. In light of Louisiana's civil law tradition and the fact that it was contemplated that the end product would be adopted by the legislature rather than the supreme court, it was decided to style the document a "Code" rather than "Rules" as was generally done elsewhere in the country.

To promote uniformity of style, the three Reporters generally worked on the same chapter, each Reporter taking initial responsibility for certain articles within the chapter. After in-depth research and drafting, frequent meetings of the Reporters and Staff Attorneys were held at which policy issues were debated and tentative drafts of the various articles discussed in minute detail. Revisions and "re-writes" were frequent and time-consuming, but as a result of extensive discussion among the Reporters, a draft article to which all could assent was generally achieved. On occasion, however, minority positions were presented to the Advisory Committee and Council.

All articles were submitted to the very helpful and hard-working Advisory Committee for its consideration. Although the issues presented to the Committee involved very basic policy determinations as to what was a fair, just and practical reconciliation of competing values, and

7. The following individuals were, for part or all of the time during this phase of the project, members of the Advisory Committee: Edward Joseph Bleich, Judge; James Boren; James L. Dennis, Justice; Howard B. Gist, Jr.; Douglas M. Gonzales, Judge; Marvin J. Goudeau III; Cheney C. Joseph, Jr.; Howard W. L'Enfant, Jr.; Paul Lynch, Judge (deceased); John Martzell; Julian R. Murray; Sydney B. Nelson; Alvin V. Oser, Judge; Wilson R. Ramshur, Judge; Joe W. Sanders, Chief Justice (retired); Lawrence P. Simon, Jr.; Thomas H. Sponsler; J. Nathan Stansbury; George M. Strickler; Francis C. Sullivan; Monica T. Surprenant; Earl E. Veron, Judge.

were sometimes hotly debated, the end results of the Committee's deliberations were generally adopted with practical unanimity. Of importance in achieving such agreement was the fact that the Reporters had presented, through rather copious "Comments" and via very frank and open dialogue, the various options available and their views as to the probable impact adoption of proposed recommendations would have upon the law.

Following consideration of the individual chapters by the Advisory Committee, the Council of the Law Institute (the ultimate decision-making body of the Institute) deliberated, article by article, on the draft proposals. Because of the advance work by the Reporters and the Advisory Committee, the proposals generally met with approval by the Council. There were, however, a number of changes made in the drafts at this stage of the process. Again, approval of individual articles was generally by an overwhelming affirmative vote.

Because there was much pressure to present a finished product to the legislature as soon as possible and because provisions relative to testimonial privileges, presumptions and burden of proof were easily severable from the rest of the Code, it was decided that the Code should be submitted to the legislature without provisions as to these subjects. By the end of 1985 the Code as thus delimited was completed on schedule.

Drafts of the articles were available to interested members of the profession as the Code was being confected. Understandably, however, general professional attention did not actively focus on the project until the Council of the Institute had completed its work. Although the Advisory Committee had been in part composed of able individuals reflecting the point of view of the prosecution, and the provisions of the Code received practically unanimous approval in both the Advisory Committee and the Council of the Law Institute, when the proposal was considered in its entirety by representatives of the Louisiana District Attorneys Association, very strong opposition developed within that group. In addition to objecting to a number of specific provisions of the proposed Code, the District Attorneys Association wished to have additional time to study the proposal. Despite the opposition, the Code of Evidence prepared by the Louisiana State Law Institute was introduced as scheduled at the 1986 Regular Session of the legislature.⁸ There, in addition to the opposition from the Louisiana District Attorneys Association, the Louisiana Trial Lawyers Association, besides expressing concern about particular provisions of the proposed code, also wanted additional time to study the code in its entirety. Consequently, the legislature in 1986 deferred action on the proposals.

8. La. H.R. 1155, Reg. Sess (1986).

Although pursuant to concurrent resolution,⁹ representatives of interested groups met in an attempt to reconcile their differences, successful solution prior to the 1987 legislative session proved unattainable. By the 1987 legislative session even stronger opposition had developed from the Louisiana District Attorneys Association, which by then had developed a proposed code of its own that was introduced in the 1987 Legislative Session.¹⁰ Efforts at compromise between the Louisiana District Attorneys Association and the Louisiana Association of Criminal Defense Lawyers proved fruitless, and again legislative action on the matter was deferred. Continued legislative interest in the matter, however, remained strong, as manifested in another concurrent resolution¹¹ aimed at reaching a conciliation of opposing views. The mechanism envisioned in the resolution for achieving such a reconciliation, however, was cumbersome and never implemented. At the 1988 Regular Legislative Session, the legislature was again presented with two Codes of Evidence, one prepared by the Louisiana State Law Institute,¹² and the other sponsored by the Louisiana District Attorneys Association.¹³ At this point a compromise was finally achieved.

As the result of conciliatory compromise efforts by many persons, and the leadership of several individuals and groups, an amended version of the Law Institute's Code was finally adopted in 1988. The compromise agreement was confected at a somewhat marathon meeting held on the eve of the proposed Code's consideration by the Senate Judiciary Committee. At this critically important compromise session were representatives of the organizations which had been legislatively active with respect to the proposal: the Louisiana District Attorneys Association, the Louisiana Association of Criminal Defense Lawyers, the Louisiana Trial Lawyers Association, the Louisiana Coalition Against Domestic Violence, and the Women's Lobby Network. In recognition of the agreement reached by representatives of these very diverse groups, the next day at the formal hearing on the bill before Judiciary Committee A of the Senate when the various amendments were introduced *in globo*, the bill was further amended to reflect that it was introduced on recommendation not only of the Louisiana State Law Institute, but also of the Louisiana District Attorneys Association, the Louisiana Association of Criminal Defense Lawyers, and the Louisiana Trial Lawyers Association.¹⁴

9. La. S. Con. Res. 107, Reg. Sess. (1986).

10. La. H.R. 1356, Reg. Sess. (1987).

11. La. S. Con. Res. 185, Reg. Sess. (1987).

12. La. S. 155, Reg. Sess. (1988).

13. La. S. 363, Reg. Sess. (1988).

14. Later in the legislative process, presumably to accord with legislative practice in such matters, reference to the latter three organizations was dropped. See La. H.R. Amend. No. 1, Reg. Sess. (June 25, 1988).

Although some additional amendments to the Code were adopted subsequent to those initially proposed at the Senate hearing, and one amendment adopted at the 1988 Second Extraordinary Session, by far the most numerous and most important from the standpoint of a general understanding of the Code were those confected at the compromise meeting held the day before the Senate Committee hearing.

Because of the legislative amendments to the Code, it was necessary to revise the Official Comments to reflect the changes, and this involved rather extensive revision of the Comments. Further, since many of the Comments accompanying the Code as presented to the legislature were explanatory of the law as it then existed, and didactic in character, at the suggestion of officers of the Institute, the Comments were somewhat abridged. As an aid in discerning legislative intent and as an analysis of the law as it existed prior to the adoption of the Code, the original Official Comments retain a certain value and are available in the Acts of the Louisiana Legislature, published by the Secretary of State.¹⁵

As noted above, the law governing privileges, presumptions and burden of proof remains to be addressed, and there seems to be general agreement that it now should be done. In many respects privileges is more controversial than any of the subjects already codified, for it is of great interest, not merely to law professionals, but to very diverse segments of our society. Further, both presumptions and burden of proof have a pervasive influence on virtually all areas of the law and it will be difficult to arrive at solutions and generalizations satisfactory to the Advisory Committee, the Council of the Law Institute, the legal profession, and finally to the legislature and the public at large. To broaden input, the Advisory Committee has been expanded and, as in the past, heavy reliance will be placed upon the combined wisdom of its members.

While preparing the material on privileges, presumptions and burden of proof, it will be possible to evaluate the provisions of the rest of the Code in actual practice and to recommend the legislative changes that seem called for.

Considering the Code as it now exists in general terms, two very important aspects should be noted. First, the Code reflects a generally hospitable attitude to the reception of relevant evidence, manifested perhaps most dramatically in the streamlining of the traditional exceptions to the hearsay rule. Secondly, and as somewhat of a counterbalance to the first, the Code, in article 403, authorizes the judge to exclude relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, etc. These two notions complement

15. The original comments were also published in 1988 La. Session Law Serv. 515 (West).

each other, for the Code's relaxation of the rigid contours of the exclusionary rules may bring about unfair, unjust results unless the courts are vigilant in excluding evidence that is substantially outweighed by one or more of the factors enumerated in article 403. In this connection it is well to recall that article 102 of the Code, which sets forth its purpose and how it is to be construed, emphasized the role to be played by fairness and justice in the application and interpretation of the Code. Such lofty precepts must be ever kept in mind lest the liberality of admissibility embraced by the Code work unfair results in the context of individual cases.

By adopting the Code, not only has Louisiana shown itself more hospitable to the admissibility of relevant evidence, it also has shown itself more receptive to evidentiary developments elsewhere in the country. Although the Louisiana Code in a number of respects departs from positions taken in the Federal Rules of Evidence and the other thirty-one state enactments that follow it, the adoption of the new Code aligns Louisiana with the majority of American jurisdictions. Although Louisiana courts will in no sense be bound by judicial decisions in other jurisdictions interpreting evidentiary provisions similar to or even identical with those adopted in the Louisiana Code,¹⁶ the interpretation given those provisions by courts in other jurisdictions will undoubtedly be read and considered by Louisiana lawyers and judges. Further, national evidentiary treatises will assume an even greater importance in Louisiana than they already occupy. Although traditionally Louisiana has generally followed the rules of the common law in evidentiary matters,¹⁷ the influence of national thought and developments with respect to the law of evidence will thus inevitably assume even greater importance in Louisiana following the adoption of the new Code.

16. See La. Code Evid. art. 102 Comment (a).

17. See Comment, *Were the Louisiana Rules of Civil Evidence Affected by the Adoption of the Louisiana Code of Criminal Procedure?*, 14 La. L. Rev. 568 (1954).

